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**From:** Tony Davis [tdavis@tucson.com]  
**Sent:** 1/18/2022 4:07:21 PM  
**To:** Stu Gillespie [sgillespie@earthjustice.org]  
**Subject:** FW: SP news: Corps Requiring New WOTUS Determinations For Pending 404 Permits

Stu,

Please give me a call on this this morning if possible or early afternoon at the latest. What's your take on the Corps' action which does affect Hudbay/Rosemont?

Thank you,

Tony Davis

520-349-0350 c

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**From:** O'Dell, Dena M CIV USARMY CESPL (USA) <Dena.M.O'Dell@usace.army.mil>  
**Sent:** Friday, January 14, 2022 3:56 PM  
**To:** Davis, Tony <TDavis@tucson.com>  
**Subject:** RE: SP news: Corps Requiring New WOTUS Determinations For Pending 404 Permits

Good afternoon Tony. In response to your media query, please see the below information and a link to the Navigable Waters Protection Rule Vacatur.

1. The Approved Jurisdictional Determinations (AJDs) completed by the L.A. District in March 2021 were issued to Hudbay Minerals, Inc., parent company of Rosemont Copper Company, based on the Navigable Waters Protection Rule (NWPR). The AJDs covered the Rosemont Copper Mine project site and utility corridor.
2. Please see the attached statement, posted on Jan. 5, 2022, regarding the Navigable Waters Protection Rule Vacatur: <https://www.usace.army.mil/Media/Announcements/Article/2888988/5-january-2022-navigable-waters-protection-rule-vacatur/>
3. Hudbay and other entities holding a final Navigable Waters Protection Rule AJD cannot rely on that AJD as accurately delineating all jurisdictional waters under the current regulatory regime within the AJD's review area.

Additionally,

4. A Department of the Army permit was issued in March 2019 to Rosemont Copper Company for discharges of dredged or fill materials associated with the Rosemont Copper Mine project. The permit was suspended in August 2019 following a decision by the U.S. District Court for the District of Arizona that vacated the Final Environmental Impact Statement upon which the Corps relied in issuing the permit. The permit decision for the currently suspended permit was based on a "Preliminary Jurisdictional Determination" which treated all waterways and wetlands on the site as geographically jurisdictional under the Clean Water Act.

Sincerely,

Dena M. O'Dell  
Chief, Public Affairs  
Los Angeles District, U.S. Army Corps of Engineers Dena.M.O'Dell@usace.army.mil

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**From:** Davis, Tony <[TDavis@tucson.com](mailto:TDavis@tucson.com)>

**Sent:** Thursday, January 13, 2022 2:29 PM

**To:** O'Dell, Dena M CIV USARMY CESPL (USA) <[Dena.M.O'Dell@usace.army.mil](mailto:Dena.M.O'Dell@usace.army.mil)>

**Subject:** [URL Verdict: Neutral][Non-DoD Source] FW: SP news: Corps Requiring New WOTUS Determinations For Pending 404 Permits

Dena,

I have been told by a source that because of this Jan. 5 policy decision by the Corps, your agency has sent Hudbay Minerals Inc. a letter, very recently, possibly as recent as yesterday, saying that the company can no longer rely on the AJDs that the Corps approved in spring 2021 that said the washes on the Rosemont site weren't jurisdictional. Is the report I received accurate? If so, can you please send me a copy of that letter? Thank you very much.

If that isn't an accurate report I've received, could you please tell me if the Corps' decision to withdraw some of the CWA jurisdictional determinations made under the Trump Administration Navigable Waters Protection Rule affects the AJD that the Corps issued for Hudbay in March 2021? (Here's our clip from that time: [https://tucson.com/news/local/feds-remove-key-clean-water-act-permit-requirement-for-rosemont-mine/article\\_122b66c8-2a4b-5056-98dd-fed234d7f7cd.html?utm\\_medium=social&utm\\_source=twitter&utm\\_campaign=user-share](https://tucson.com/news/local/feds-remove-key-clean-water-act-permit-requirement-for-rosemont-mine/article_122b66c8-2a4b-5056-98dd-fed234d7f7cd.html?utm_medium=social&utm_source=twitter&utm_campaign=user-share))

If the Rosemont/Hudbay AJDs issued in March 2021 aren't valid any longer, what will happen next? Will the mine site then fall under the original preliminary JD's that it made back in the early 2010s? And will the agency then have to make another decision on final, approved JDs?

Thank you very much,

Tony Davis

Environmental reporter

Arizona Daily Star

520-349-0350 c

<https://insideepa.com/daily-news/corps-requiring-new-wotus-determinations-pending-404-permits>

# Corps Requiring New WOTUS Determinations For Pending 404 Permits

January 13, 2022

The Army Corps of Engineers is withdrawing Clean Water Act (CWA) jurisdictional determinations made under the Trump-era definition of waters of the United States (WOTUS) for new or pending dredge-and-fill permitting decisions after a federal court vacated it last year, creating uncertainty for many permit applicants.

"This departure from normal policy will have implications for many who secured [determinations] in reliance on previous practice and the provisions of the [Trump-era definition]," says Ann Navaro, a former Corps attorney who is now a partner with the Bracewell law firm.

While the Corps will not revisit permit decisions that relied on a so-called approved jurisdictional determination (AJD) made under the narrow Trump-era definition, known as Navigable Waters Protection Rule (NWPR), the Corps is requiring pending permit applications to rely on new determinations using the current, pre-Obama WOTUS definition, according to [a Jan. 5 announcement](#).

"As a general matter, the agencies' actions are governed by the definition of 'waters of the United States' that is in effect at the time the Corps completes an AJD, not by the date of the request for an AJD," the Corps says.

AJDs completed prior to the U.S. District Court for the District of Arizona's Aug. 30 decision [vacating the NWPR](#) and not associated with a permit action will not be reopened until their expiration date, the Corps says. These AJDs are also known as stand-alone AJDs, the Corps says.

EPA and the Corps have interpreted the district court's vacatur as applying nationally and [have stopped implementing](#) the NWPR. Instead, they have reverted to the WOTUS definition in place prior to the Obama-era WOTUS rule, referred to as the pre-2015 regulatory regime, and have proposed [a new WOTUS definition](#).

But while the Corps says these stand-alone AJDs will generally remain valid for five years after their issuance, the agency says it will not rely on an AJD issued under the NWPR in making a new permit decision.

"Therefore, for any currently pending permit action that relies on a NWPR AJD, or for any future permit application received that intends to rely on a NWPR AJD for purposes of permit processing, the Corps will discuss with the applicant . . . whether the applicant would like to receive a new AJD completed under the pre-2015 regulatory regime to continue their permit processing or whether the applicant would like to proceed in reliance on a preliminary JD or no JD whatsoever," the Corps says.

An AJD requires a site visit from the Corps to determine which waters on the site are WOTUS while a preliminary JD presumes all waters and wetlands are jurisdictional and does not require a site visit, which can speed the permitting process.

The Biden administration has cited the increase in AJDs finding waters are non-jurisdictional under the NWPR to be one of the factors driving its push to craft a new WOTUS definition.

In [legal filings](#) last year where EPA and the Corps sought a voluntary remand of the NWPR, EPA water chief Radhika Fox said that in addition to an increase in non-jurisdictional determinations, EPA and the Corps "have also found that preliminary jurisdictional determinations (through which applicants proceed with permitting as though all resources were jurisdictional) are much less common under the NWPR, indicating that fewer project proponents believe waters are jurisdictional from the start."

Of the 40,211 individual aquatic resources or water features for which the Corps made approved jurisdictional determinations under the NWPR between June 22, 2020, and April 15, 2021, approximately 76 percent were found to be non-jurisdictional, Fox said.

## Smoothing The Transition

While Corps officials are downplaying the effects of the announcement, some fear the move will increase permitting uncertainty.

Many landowners or project proponents planning complex projects had sought AJDs under the NWPR, anticipating potential swings in jurisdiction with future changes in administration, Bracewell's Navaro writes in [a Jan. 10 blog post](#).

"Securing an AJD had been a way to establish some regulatory certainty to facilitate long term project planning--essentially smoothing out the transition between administrations or regulatory frameworks for regulated entities," Navaro says, noting that under both the NWPR and the Obama-era WOTUS rule, the Corps was explicit that previously issued AJDs remained valid.

Her concerns about permitting uncertainty follow fears others raised when some Corps districts late last year [temporarily halted](#) the use of streamlined CWA dredge-and-fill permits for a host of activities, citing a court vacatur of the Trump rule governing state certifications that federal permits will not violate state water quality standards.

While the action was eventually reversed, some former EPA attorneys questioned whether the Corps would seek new approvals or certifications from states for its permits and whether it would require the Corps to re-promulgate its already issued permits with new state conditions and more.

In addition to Navarro, Sen. Shelley Moore Capito (R-WV), the top Republican on the Senate Environment and Public Works Committee (EPW), pressed Corps officials at a Jan. 12 hearing on whether the NWPR vacatur is resulting or will result in the revocation of already issued dredge-and-fill permits.

Assistant Secretary of the Army for Civil Works Michael Connor testified at the Jan. 12 EPW hearing that the Corps is making progress on several key CWA regulatory issues, including working with EPA to develop a "durable" WOTUS definition and lifting in November a temporary pause on finalizing CWA section 404 permit decisions that were in effect immediately after the vacatur of the NWPR and the state water quality certification rule.

Additionally, Connor said, the Corps "is working to resolve the vast majority of the outstanding jurisdictional determination decisions."

In response to questions from Capito about project permitting, Connor said the Corps would not as a general rule be changing decisions made under the NWPR but that there could be circumstances when that was necessary or desirable.

"We're not going to go back and revisit all decisions that were made" because the Corps is "trying to move forward in the process," Connor said. But the Corps recognizes "there may be new information that may warrant revisiting some of those determinations," he added. "That's going to have to play out, and that's a conversation we're going to have to have with the actual permittees."

Capito asked whether Connor was saying that some permits already granted could be retroactively revoked.

He replied that in general, the Corps believes that "decisions made under the appropriate rules at that time are valid. We're not going to go back."

But he said there is the possibility there may be some legal risk for some land owners now, not because the Corps is seeking to change things but simply because the NWPR was vacated. "That's new terrain for us. So, we all have to think through that from a regulatory/agency perspective as well as the permittee perspective." -- *Lara Beaven* ([lbeaven@iwpnews.com](mailto:lbeaven@iwpnews.com))